RECORD NUMBER: 19-1297

United States Court of Appeals

for the

Fourth Circuit

EUGENE BATEN; CHESTER WILLIS; CHARLETTE PLUMMER–WOOLEY; BAKARI SELLERS; CORY C. ALPERT; and BENJAMIN HORNE,

Plaintiffs/Appellants,

– v. –

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; MARK HAMMOND, in his official capacity as Secretary of State of the State of South Carolina; SOUTH CAROLINA ELECTION COMMISSION; BILLY WAY, JR., in his official capacity as Chair of the Election Commission; MARK BENSON, in his official capacity as a Commission Member of the Election Commission; MARILYN BOWER, in her official capacity as a Commission Member of the Election Commission; E. ALLEN DAWSON, in his official capacity as a Commission Member of the Election Commission; NICOLE SPAIN WHITE, in her official capacity as a Commission Member of the Election Commission,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

BRIEF OF APPELLEES GOVERNOR MCMASTER AND SECRETARY HAMMOND

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 19-1297 Caption: Eugene Baten et al. v. Henry McMaster et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Henry McMaster, in his official capacity as Governor of the State of South Carolina
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Thomas A. Limehouse, Jr. Date: 3/27/2019

Counsel for: Appellee Henry McMaster

CERTIFICATE OF SERVICE

****

I certify that on 3/27/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/Thomas A. Limehouse, Jr. 3/27/2019
(signature) (date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

INTRODUCTION

Plaintiffs claim that the Constitution prohibits South Carolina from using a method of appointing presidential electors that dates back to the first presidential election following ratification of the Constitution and that is currently used in all but two States. In doing so, Plaintiffs ignore two centuries of electoral practice and binding Supreme Court precedent. Plaintiffs' constitutional and statutory claims are neither novel nor plausible, and they have offered no valid justification for deviating from settled law to consider their generalized partisan grievances and order proportional representation in the Electoral College. Simply stated, Plaintiffs' claims lack merit, and this Court lacks subject-matter jurisdiction to entertain the same.

Article II, Section 1 of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. The method by which the States' electors, acting collectively as the Electoral College, select the President and Vice President is set forth in the Twelfth Amendment. U.S. Const. amend. XII. The South Carolina General Assembly—exercising its plenary, exclusive constitutional authority—has adopted the statewide "winner-take-all" approach to allocating presidential electors in the Electoral College. *See* S.C. Code Ann. § 7-19-70 (2019).

South Carolina, of course, was not the first State to distribute its electoral votes in this manner. In 1789, Pennsylvania used the winner-take-all method in the election of George Washington. Nor is South Carolina alone in using this approach. Today, forty-eight States and the District of Columbia use the winner-take-all method. Only two States, Maine and Nebraska, employ different allocation systems.

On February 21, 2018, Plaintiffs filed a complaint in the U.S. District Court for the District of South Carolina challenging the winner-take-all system. Plaintiffs—who alleged a trilogy of manufactured constitutional and statutory claims—sought declaratory and mandatory, prospective injunctive relief. Their challenge is the latest in a long line of unsuccessful attempts to overrule the States' constitutionally committed discretion to appoint electors as their legislatures deem appropriate. But the winner-take-all system is the predominant electoral method used across the United States, and it has withstood constitutional scrutiny for over two centuries. While the law is settled on this point, Plaintiffs nevertheless contend the winner-take-all method: (1) violates the one-person, one-vote principle of the Fourteenth Amendment; (2) burdens their rights to freedom of association under the First and Fourteenth Amendments; and (3) runs afoul of Section 2 of the Voting Rights Act.

Upon motion of Defendant–Appellee Henry McMaster, in his official capacity as Governor of the State of South Carolina ("Governor McMaster"), and

joined by Mark Hammond, in his capacity as Secretary of State of the State of South Carolina ("Secretary Hammond"), the district court dismissed Plaintiffs' complaint, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), because Plaintiffs failed to state any plausible claims for relief. In so finding, the district court continued courts' unbroken record of rejecting these challenges. After all, the Supreme Court has long recognized that "the appointment and mode of appointment of electors belong exclusively to the states." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And just fifty years ago, the Supreme Court summarily affirmed a decision rejecting the same basic challenge to the Electoral College appointment method Plaintiffs seek to raise here. *See Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968) (three-judge court), *aff'd*, 393 U.S. 320 (1969) (per curiam), *reh'g denied*, 393 U.S. 1112 (1969).

In light of this summary affirmance, courts across the country have rejected the latest quixotic quest to divest the States of their constitutionally committed discretion to choose electors as they deem fit. *Williams* binds this Court just as it did the district court below. Thus, the Court can quickly dispense with Plaintiffs' claims by applying settled law to uphold a longstanding electoral practice. The winner-take-all method is constitutional, and the States' custom of using it has "prevailed too long and been too uniform to justify . . . interpreting the language" of the Constitution otherwise. *McPherson*, 146 U.S. at 36.

South Carolina gives all its citizens the equal right to vote for electors on a statewide basis. Although Plaintiffs contend the losing side should receive proportional representation in the Electoral College, their partisan policy preferences find no textual basis in either the Constitution or the Voting Rights Act. And as the Supreme Court recently held this summer, Plaintiffs are asking the Court to pass upon nonjusticiable political questions and grant relief that is beyond the power of the federal judiciary. Plaintiffs also lack standing under Article III to bring this action because they have suffered no redressable injury-in-fact. Indeed, Plaintiffs can only achieve their partisan goal via the General Assembly or a constitutional amendment, and this Court is not the appropriate forum to entertain either policy debate.

To date, federal courts have consistently rejected these attempts to eradicate the winner-take-all method, and Plaintiffs have offered no legitimate reason for departing from that tradition in this case or in this State. Accordingly, for the reasons outlined herein, the Court should affirm.

STATEMENT OF JURISDICTION

Plaintiffs filed the instant action in the district court challenging South Carolina's use of the predominant method for selecting and allocating presidential electors, asserting claims based on the First and Fourteenth Amendments to the Constitution, as well as Section 2 of the Voting Rights Act, 52 U.S.C. §§ 10301 *et*

seq. Plaintiffs generally alleged that the district court had subject-matter jurisdiction over their constitutional claims pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331 and over their cause of action for violation of Section 2 of the Voting Rights Act based on 28 U.S.C. § 1343(a)(3), (4) and 28 U.S.C. § 1331. (J.A. 18).

The district court issued an order dismissing Plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on March 8, 2019, and entered judgment accordingly on March 11, 2019. (J.A. 610–11). The district court's dismissal of Plaintiffs' complaint constituted an appealable judgment pursuant to Rule 54(a) of the Federal Rules of Civil Procedure. *See McLean v. United States*, 566 F.3d 391, 396 (4th Cir. 2009). Plaintiffs timely noticed their appeal, (J.A. 612–13), and this Court has appellate jurisdiction over the district court's decision pursuant to 28 U.S.C. § 1291.

Notwithstanding the foregoing, as noted in Governor McMaster's motion to dismiss the appeal, the Court lacks subject-matter jurisdiction over the present dispute. (Dkt. No. 45). At bottom, Plaintiffs' challenge "invariably sound[s] in a desire for proportional representation" for presidential electors that would require the Court to pass upon a nonjusticiable political question and, in doing so, make the very type of "fairness" determinations the Supreme Court recently held were beyond the ken of the federal judiciary. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). Plaintiffs also lack the requisite Article III standing to maintain this action

in which they are attempting to litigate generalized partisan policy preferences that cannot be redressed in federal court. Accordingly, the Court should decline to address the merits of Plaintiffs' claims on the basis of "hypothetical jurisdiction." Instead, the Court should promptly dispose of the appeal, vacate the district court's order, and remand with instructions to dismiss for want of subject-matter jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs have carried their burden of establishing subject-matter jurisdiction, where Plaintiffs raise nonjusticiable political questions and cannot satisfy the threshold standing requirement.

2. Whether South Carolina's winner-take-all system comports with the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment, where all votes cast are counted and weighed equally, and the winner-take-all approach does not inherently favor or disfavor any particular group of voters.

3. Whether South Carolina's selection of presidential electors infringes upon Plaintiffs' associational rights under the First and Fourteenth Amendments, where the winner-take-all approach does not restrict ballot access or impair the ability of citizens to express their political preferences.

4. Whether Plaintiffs have stated a plausible cause of action under Section 2 of the Voting Rights Act, where the claim is based not on racial identification and discrimination but rather on partisan political affiliation.

STATEMENT OF THE CASE

Since our Nation's founding, the States have exercised the plenary discretion afforded to them in Article II, Section 1 of the Constitution to appoint presidential electors through a "general ticket" system. Today, forty-eight States and the District of Columbia use the winner-take-all method. (J.A. 86). Under this approach, "[t]he names of electors" are not "printed on the ballot." S.C. Code Ann. § 7-19-70 (2019). Instead, "the names of the candidates for President and Vice President of each political party" are printed on the ballot, and "[a] vote for the candidates named on the ballot" is deemed "a vote for the electors of the party by which those candidates were nominated." *Id.* After calculating which slate of candidates receives the most votes, South Carolina then awards its nine electoral votes to the prevailing candidates. This appeal arises out of Plaintiffs' personal dissatisfaction with the results produced by this predominant method of appointing presidential electors.

On February 21, 2018, Plaintiffs filed a lawsuit in the Charleston Division of the U.S. District Court for the District of South Carolina, challenging South Carolina's winner-take-all system. (J.A. 12–45). According to Plaintiffs, the State's manner of appointing presidential electors: (1) violates the one-person, one-vote

principle of the Equal Protection Clause of the Fourteenth Amendment; (2) burdens their rights to freedom of association under the First and Fourteenth Amendments; and (3) runs afoul of Section 2 of the Voting Rights Act. (J.A. 13–17). Plaintiffs' action was one of four companion cases filed by "a relatively similar group of lawyers" across the country in this multijurisdictional challenge to the winner-take-all system. (J.A. 599).

In their complaint, Plaintiffs sought declaratory and mandatory injunctive relief designed to scrap the winner-take-all system and replace it with proportional representation. (J.A. 16). Plaintiffs asked the district court to "enjoin Defendants from selecting Electors under the challenged [winner-take-all] system" and to "set reasonable deadlines for state authorities to propose and then implement a method of selecting Electors that treats each South Carolina citizen's vote for the President in an equal manner, making clear that such a system cannot include selection by Congressional District vote." (J.A. 43–44 (emphasis omitted)). Further, "if state authorities fail to propose or implement a valid method of selecting Electors by the Court's deadlines," Plaintiffs asked the district court to "order a proportional method of distributing Electors, selecting a proportional number of Electors to each party, based on the number of votes each party's candidate receives statewide." (J.A. 44). Plaintiffs also asked for costs and attorneys' fees. (J.A. 44).

Governor McMaster moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing Plaintiffs failed to "articulate a single viable cause of action or otherwise state a claim for relief that is plausible on its face." (J.A. 73). Secretary Hammond joined the Governor's motion, (J.A. 93), and Plaintiffs filed a response in opposition, (J.A. 96). Following a hearing, (J.A. 505–34), the district court entered an order dismissing Plaintiffs' complaint with prejudice, (J.A. 598–610).[1]

As for the one-person, one-vote claim, the district court found *Williams* controlling and declined to "extend the principles of *Bush v. Gore* to a factually distinct scenario, particularly given the unique nature of the electoral college system." (J.A. 607). On the merits, the court agreed "with the other district courts that have recently considered this issue," finding the winner-take-all "system 'complies with equal protection because it does not inherently favor or disfavor a particular group of voters.'" (J.A. 605 (quoting *Lyman v. Baker*, 352 F. Supp. 3d 81, 89 (D. Mass. 2018))). According to the court, "[w]hile the outcome is not as proportional to the citizens' choices as plaintiffs might like, '[t]o the extent that the plaintiffs desire nevertheless to invalidate this system and establish a proportionate

1. The remaining Defendants—namely, the South Carolina Election Commission and its members—answered Plaintiffs' complaint and did not take a position with respect to Governor McMaster's motion to dismiss and have not taken a position with respect to Plaintiffs' appeal of the district court's order granting the same.

one, that is not something this court is empowered to do.'" (J.A. 605 (quoting *Lyman*, 352 F. Supp. 3d at 90)).

Turning to Plaintiffs' First Amendment claim, the district court rejected their argument that the winner-take-all "system places burdens on the right of association and the right to have a voice in presidential elections through casting a vote." (J.A. 607). The court found "the plaintiffs have not sufficiently alleged that the rights of voters to associate in any manner or to engage in any political activity or association have actually been burdened." (J.A. 607). Instead, Plaintiffs were merely alleging "that the inability of Democratic voters in South Carolina to succeed in having any electoral votes distributed to a Democratic presidential candidate for the past forty years has dampened the likelihood that they will engage in political activity, as it appears useless." (J.A. 607–08). The court, however, was unpersuaded and said Plaintiffs' "argument conflates a diminishing *motivation* to participate with a severe burden on the actual *ability* of people to participate in the voting process." (J.A. 608).

Last, the district court held that Plaintiffs failed to state a plausible claim for relief under Section 2 of the Voting Rights Act. (J.A. 609–10). The court initially questioned whether courts could "consider the constitutionality of a state's [winner-take-all] electoral college system using the same legal tools and concepts of constitutional fairness that the courts have relied on in assessing state-level voting

procedures." (J.A. 609). In any event, the court concluded that South Carolina's winner-take-all approach to appointing presidential electors "does not mean that the political process is 'not equally open to *participation* by' Democratic voters, whether they be African-American or of another race." (J.A. 609 (quoting 52 U.S.C. § 10301(b)). The court also found that "many white South Carolinians voted for Democratic candidates in the past, demonstrating that the white majority has not voted 'sufficiently as a bloc . . . to defeat the minority's preferred candidate.'" (J.A. 609–10 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986)).

The district court then entered final judgment, (J.A. 611), and Plaintiffs filed a timely notice of appeal in this Court, (J.A. 612–13). After Plaintiffs filed their opening brief, (Dkt. No. 26), Governor McMaster moved to dismiss the appeal for want of subject-matter jurisdiction on standing and justiciability grounds, (Dkt. No. 45).[2] The Court suspended the briefing schedule pending resolution of the motion to dismiss, (Dkt. No. 47), and Plaintiffs filed a response in opposition, (Dkt. No. 52). Ultimately, the Court deferred ruling on the motion to dismiss and ordered the Clerk to resume the briefing schedule. (Dkt. No. 53).

2. In the interim, Professor Edward Foley moved for leave to file a brief of proposed *amicus curiae*, (Dkt. No. 30), which the Court granted, (Dkt. No. 38).

STANDARD OF REVIEW

The Court reviews de novo questions involving subject-matter jurisdiction, which raise "pure question[s] of law." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). As the party asserting jurisdiction, the plaintiff bears the burden of establishing subject-matter jurisdiction. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Questions regarding subject-matter jurisdiction "may (or, more precisely, must) be raised *sua sponte* by the court," *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004), and shall be resolved before reaching the merits, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

The Court also "review[s] de novo the grant of a motion to dismiss for failure to state a claim." *Garnett v. Remedi SeniorCare of Va., LLC*, 892 F.3d 140, 142 (4th Cir. 2018) (quoting *Gerner v. Cty. of Chesterfield*, 674 F.3d 264 (4th Cir. 2012)), *cert. denied*, 139 S. Ct. 605 (2018). In doing so, the Court views the factual allegations in the light most favorable to the plaintiff. *See Cruz v. Maypa*, 773 F.3d 138, 141 (4th Cir. 2014).

SUMMARY OF ARGUMENT

As a threshold matter, the Court should dismiss the appeal for want of subject-matter jurisdiction, because Plaintiffs' proportional representation claims present nonjusticiable political questions beyond the reach of the federal judiciary. The

Constitution entrusted state legislatures with plenary authority to determine the manner of appointment of electors in presidential elections, and this Court has no occasion to wade into this political thicket to address Plaintiffs' generalized partisan grievances. To be sure, their demands for proportional representation echo the same vague "fairness" cries that the Supreme Court recently rejected in *Rucho*. Plaintiffs similarly cannot meet the requirements of Article III standing, because: (1) their generalized partisan grievances do not constitute an injury-in-fact; (2) their purported injuries are not fairly traceable to the named Defendants, given that the manner of electoral appointment rests solely in the discretion of the South Carolina General Assembly; and (3) their claims are not redressable because, as noted above, the Court cannot order proportional representation.

Even on the merits, Plaintiffs fare no better. Plaintiffs' one-person, one-vote claim is foreclosed by two centuries of longstanding electoral practice and by binding Supreme Court precedent. As the Supreme Court noted in *McPherson* and confirmed again in *Bush*, state legislatures' power to choose the manner of appointing presidential electors is plenary. Pursuant to this authority, forty-eight States and the District of Columbia have decided to adopt the statewide winner-take-all approach, which was first used in the presidential election of 1789. Contrary to Plaintiffs' assertions, the Supreme Court's summary affirmance in *Williams* controls

this case, and they have not identified sufficiently distinct facts or a cognizable doctrinal shift to warrant this Court departing from established precedent.

Although Plaintiffs seek to invoke *Gray* to circumvent the preclusive effect of *Williams*, their argument fails right out the gate because the Supreme Court expressly recognized that the issues addressed in *Gray* were inapposite to the Electoral College system. In any event, South Carolina's winner-take-all system comports with the Equal Protection Clause because it gives all who participate an equal vote and does not inherently favor or disfavor any particular group of voters. Plaintiffs had the right to vote—and did vote—in the elections about which they now complain, and nothing about the winner-take-all system infringed upon or frustrated that right. Thus, Plaintiffs' one-person, one-vote claim fails as a matter of law.

Plaintiffs similarly fail to state a plausible claim for relief under the First and Fourteenth Amendments. While Plaintiffs primarily rely upon the theory Justice Kagan espoused in her concurrence in *Gill* and her dissent in *Rucho*, a majority of the Court did not agree with her theory. As the district court cogently noted, Plaintiffs' argument conflates a diminishing motivation to participate in elections with a severe burden on the actual ability of people to participate in the voting process. Plaintiffs' reliance upon inapposite First Amendment cases is misplaced. South Carolina's chosen method of allocating presidential electors affords Plaintiffs, just like every other voter, the opportunity to express their presidential preference

by voting in the election. Although Plaintiffs may be disappointed with the outcomes of past elections, the First Amendment guarantees only the right to participate in the political process, not political success. The district court properly declined to reach the second prong of the First Amendment analysis because Plaintiffs failed to state a viable cause of action. However, even considering the state interest, Plaintiffs' claim still fails because South Carolina—like every other State in the Union—has an interest in maximizing its influence in the Electoral College by having its nine electors vote in a unified bloc. This principle is no less true today than it was when Thomas Jefferson said it in 1800 and the *Williams* court recognized it again in 1968.

Finally, Plaintiffs' cause of action under Section 2 of the Voting Rights Act fails as a matter of law because their claim of racial vote dilution is a mere euphemism for political defeat at the polls. The Supreme Court has recognized that the ultimate aim of Section 2 is equality of opportunity, not a guarantee of electoral success. Here, Plaintiffs are trying to conflate political affiliation with racial identification and equate dissatisfied voters with disenfranchised citizens; however, Section 2 was not designed to remedy such generalized partisan grievances. Plaintiffs also failed to propose an acceptable undiluted remedy for the district court to consider, instead asking for judicially imposed proportional representation, which

is expressly disallowed under the text of Section 2. Therefore, Plaintiffs failed to state a plausible claim for relief under Section 2 of the Voting Rights Act.

The Court should dismiss the appeal, vacate the district court's order, and remand with instructions to dismiss Plaintiffs' complaint for want of subject-matter jurisdiction. In the alternative, the Court should affirm the district court's judgment on the merits because Plaintiffs failed to state any plausible claims for relief.

ARGUMENT

I. The Court Should Dispose of the Appeal for Want of Jurisdiction.

The Court should dispose of the present appeal for want of subject-matter jurisdiction, because Plaintiffs' partisan pleas for proportional representation fail for the threshold reason that they are inherently nonjusticiable. Similarly, the Court should not proceed to entertain and address the merits of Plaintiffs' implausible constitutional and statutory claims, because Plaintiffs have failed to carry their burden of demonstrating the requisite Article III standing. Accordingly, the Court should vacate the district court's merits determination and remand this matter with instructions to dismiss Plaintiffs' complaint lack of subject-matter jurisdiction.[3]

3. In the interest of brevity, Governor McMaster and Secretary Hammond will not restate all of the arguments made in Governor McMaster's motion to dismiss the appeal, (Dkt. No. 45), on which the Court deferred ruling and reserved judgment, (Dkt. No. 53). However, Governor McMaster and Secretary Hammond rely upon and incorporate by reference all arguments raised and authorities cited in the motion to dismiss as if set forth verbatim herein.

A. Plaintiffs' partisan proportionality claims are not justiciable.

At the outset, Plaintiffs' proportionality claims fail for the fundamental reason that they present inherently nonjusticiable political questions. Because these matters are entrusted to a political branch of government and lack judicially discoverable and manageable standards, they are "outside the courts' competence and therefore beyond the courts' jurisdiction." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Article II, Section 1 of the Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1, cl. 2. This provision reflects the Framers' intent that the States and their politically accountable representatives were best suited for determining the manner of appointing presidential electors. *See Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("[T]he state legislature's power to select the manner for appointing electors is plenary." (citing *McPherson v. Blacker*, 146 U.S. 1, 35 (1892))). The authority of federal courts to act is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." *Rucho*, 139 S. Ct. at 2494 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). This jurisdictional limitation requires a threshold determination of whether Plaintiffs have presented "claims of *legal* right, resolvable

according to *legal* principles, or political questions that must find their resolution elsewhere." *Id.* (citing *Gill*, 138 S. Ct. at 1926–27).

Here, Plaintiffs repeatedly attempt to transform their political arguments and policy preferences into cognizable constitutional claims. But Plaintiffs failed to plead anything more than an abstract desire for partisan "fairness." It appears their goal is to have the results of the Electoral College vote reflect that of the national popular vote, thereby fundamentally changing the American electoral process. However, that is not the job of the federal judiciary. Given that they are "[u]nable to claim that the Constitution requires proportional representation outright," Plaintiffs are left to "inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*." *Id.* at 2499. As the *Rucho* Court clarified, however, "fairness" is not a workable standard because "there is a large measure of 'unfairness' in any winner-take-all system." *Id.* at 2500. And "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* at 2499.

Simply put, "a person is [not] entitled to have his political party achieve representation in some way commensurate to its share of statewide support" just because "each person must have an equal say in the election of representatives." *Id.* at 2501. Courts "have no commission to allocate political power and influence in

the absence of a constitutional directive or legal standards to guide [them] in the exercise of such authority." *Id.* at 2508. In this instance, the Constitution committed these inherently political policy determinations to state legislatures, not the federal judiciary, and thus failed to offer any corresponding judicially discoverable or otherwise manageable standards. Absent such constitutional directives, the Court is without authority to pass upon Plaintiffs' general partisan grievances sounding in "fairness," which the Supreme Court squarely rejected earlier this year in *Rucho*. Because the plenary power and discretion to select the manner of appointing electors is entrusted to the States, the Constitution requires the Court to dispose of Plaintiffs' nonjusticiable political questions for lack of subject-matter jurisdiction.

Therefore, the Court should vacate the district court's merits order and remand with instructions to dismiss Plaintiffs' complaint, because it presents nonjusticiable political questions over which the Court lacks subject-matter jurisdiction. Although "[i]t is emphatically the province and duty of the judicial department to say what the law is," in the present case, "that means [the Court's] duty is to say 'this is not law.'" *Id.* (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

B. Plaintiffs lack Article III standing to bring these claims.

Similarly, the Court should decline to reach the merits of this appeal because Plaintiffs fail to allege or establish the critical elements of the "irreducible constitutional minimum" of Article III standing. *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 560–61 (1992). At the outset, to satisfy Article III's threshold jurisdictional requirement of standing, a plaintiff must establish "that he '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Gill*, 138 S. Ct. at 1929 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). "To ensure that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society,' a plaintiff may not invoke federal-court jurisdiction unless he can show 'a personal stake in the outcome of the controversy.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984); *Baker*, 369 U.S. at 204). After all, federal courts are "not responsible for vindicating generalized partisan preferences." *Rucho*, 139 S. Ct. at 2501 (quoting *Gill*, 138 S. Ct. at 1933–34).

For a plaintiff to establish a cognizable injury-in-fact, he "must show that he . . . suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). The Supreme Court, of course, has "long recognized that a person's right to vote is 'individual and personal in nature.'" *Gill*, 138 S. Ct. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). However, to demonstrate the requisite standing to seek a judicial remedy,

voters must allege facts sufficient to show "disadvantage to themselves as individuals." *Id.* (quoting *Baker*, 369 U.S. at 206).

Here, Plaintiffs generally insist that they have suffered such an injury because their partisan preferences have not been, and will not be, proportionally reflected in South Carolina's presidential electors. Plaintiffs' alleged injuries are premised upon general claims that their votes are effectively diluted because Democratic presidential candidates have not received a plurality or majority of the statewide vote in South Carolina in recent years. However, as outlined further in Governor McMaster's motion to dismiss the instant appeal, Plaintiffs are not seeking to vindicate individual and particularized injuries. Rather, they are attempting to litigate generalized partisan policy preferences that are common to all "losing" party voters in each state operating under the winner-take-all system. As noted in greater detail below, Plaintiffs cannot succeed on their constitutional challenge to the winner-take-all method because they have no legally protected interest in the relief they seek. *See Rucho*, 139 S. Ct. at 2499 (noting the Supreme Court has "clearly foreclose[d] any claim that the Constitution requires proportional representation" (quoting *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality opinion))). More importantly, though, Plaintiffs lack standing to maintain their challenge because they cannot overcome the "fundamental problem" that theirs is "a case about group political interests, not individual legal rights." *Gill*, 138 S. Ct. at 1933. Plaintiffs'

own complaint makes clear that their principal objection is premised on the perceived ineffectiveness of their collective, not individual, votes.

Further, Plaintiffs have failed to establish that any of their alleged harms are "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560–61 (alteration in original). Notably, Plaintiffs neglected to name the South Carolina General Assembly—the only branch of government to which the Constitution vested plenary and exclusive authority for selecting the appropriate method of appointing presidential electors—in their legal challenge. Plaintiffs' objection is with the General Assembly's exercise of its constitutionally committed discretion under Article II, Section 1, not the actions of any of the named Defendants. While Plaintiffs claim they "need not await legislative action before asserting a fundamental right," they can only forgo the waiting period if a federal court is the appropriate forum for raising such an issue. As noted above, this issue is not fit for judicial resolution. Because Plaintiffs cannot demonstrate that their generalized partisan grievances are fairly traceable to the actions of the named Defendants, they failed to satisfy the second prong of Article III standing.

Last, Plaintiffs cannot show that their alleged injuries are "likely to be redressed by a favorable judicial decision." *Gill*, 138 S. Ct. at 1929. As the parties seeking to invoke the Court's jurisdiction, Plaintiffs must demonstrate that

redressability is "'likely,' as opposed to merely 'speculative.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43). The district court cogently recognized that federal courts are not capable of redressing Plaintiffs' shared political shortcomings and general partisan grievances by imposing upon the States a proportionate method of selecting electors. (J.A. 605 (quoting *Lyman*, 352 F. Supp. 3d at 90)). After all, "[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution." *Rucho*, 139 S. Ct. at 2507.

Indeed, requiring the State of South Carolina to implement such a method of appointing electors would run afoul of the plain language of the Constitution, which vests exclusive, plenary discretion with the General Assembly. *See* U.S. Const. art. II, § 1, cl. 2. Plaintiffs' argument that an injunction would not create such a tension is without merit. Even if the Court did not require the State to implement a specific approach to appointing electors, Plaintiffs' requested relief would have the practical effect of preventing the State from implementing its preferred method. Such an outcome would conflict with the plain language of the Constitution and raise serious concerns of federalism, separation of powers, and comity. Under these circumstances, the Court should decline to wade into this political thicket because it is without the constitutional power—much less discernable standards—to fashion and enforce Plaintiffs' requested remedy.

The South Carolina General Assembly would be the more appropriate forum for Plaintiffs to air their political grievances because it is the only entity capable of redressing them. *See* U.S. Const. art. II, § 1, cl. 2; *Williams v. Va. State Bd. of Elections*, 288 F. Supp. 622, 628–29 (E.D. Va. 1968) (three-judge court), *aff'd*, 393 U.S. 320 (1969) (per curiam), *reh'g denied*, 393 U.S. 1112 (1969); *see also Rucho*, 139 S. Ct. at 2508 ("not[ing] that the avenue for reform established by the Framers . . . remains open"). And if Plaintiffs want to strip state legislatures of their plenary constitutional authority to determine the manner of appointing electors, they need to seek a constitutional amendment. *See Williams*, 288 F. Supp. at 628–29 (holding the plaintiffs' preferred "method cannot be forced upon the State legislatures, for the Constitution gives them the choice," and "a compulsory compliance with their demand or any other proposed limitation on the selection by the State of its presidential electors would require a Constitutional amendment"). This Court should not referee such policy debates, and Plaintiffs should redirect their advocacy to the appropriate forum.

* * *

In sum, Plaintiffs' complaint raises nonjusticiable political questions over which the Court lacks subject-matter jurisdiction, and Plaintiffs have failed to satisfy the threshold requirements for Article III standing. Thus, the Court should decline to address the merits of Plaintiffs' claims solely on the basis of "hypothetical

jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Instead, the Court should dispose of the instant appeal, vacate the district court's order addressing the merits, and remand with instructions to dismiss the complaint for want of subject-matter jurisdiction.

II. The Winner-Take-All Method Does Not Violate the One-Person, One-Vote Principle of the Equal Protection Clause of the Fourteenth Amendment.

In the event the Court determines that it has subject-matter jurisdiction over the present action, the Court should affirm the district court's dismissal of Plaintiffs' one-person, one-vote claim under the Equal Protection Clause of the Fourteenth Amendment because: (1) it ignores longstanding electoral practice and is foreclosed by binding Supreme Court precedent; and (2) even on the merits, South Carolina's winner-take-all method for appointing presidential electors comports with the Fourteenth Amendment since all votes are equally weighed.

A. Plaintiffs' one-person, one-vote claim ignores longstanding electoral practice and is foreclosed by binding Supreme Court precedent.

In outlining how the President of the United States is elected, as well as the structure of the Electoral College, the Constitution "grants considerable discretion to the states to determine how to select electors." *Schweikert v. Herring*, No. 3:16-cv-00072, 2016 WL 7046845, at *2 (W.D. Va. Dec. 2, 2016); *see also* U.S. Const. art. II, § 1, cl. 2. This constitutional commitment of exclusive appointment authority

to the States was borne of compromise. Indeed, the Framers considered and rejected a variety of approaches to selecting presidential electors in a uniform manner. *See generally McPherson*, 146 U.S. at 28–33 (discussing the various proposals considered at the Constitutional Convention in connection with Article II, Section 1, Clause 2 as well as "contemporaneous and subsequent action under the clause"). The Framers ultimately "reconciled [a] contrariety of views by leaving it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." *Id.* at 28.

Although "various modes of choosing the electors were pursued" after ratification, "[n]o question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt." *Id.* at 29. To be sure, "it is seen from the formation of the government until now the practical construction of [Article II, Section 1, Clause 2] has conceded plenary power to the state legislatures in the matter of the appointment of electors." *Id.* at 35. This construction "has prevailed too long and been too uniform to justify [the Court] in interpreting the language of the constitution as conveying any other meaning . . . , and it must be treated as decisive." *Id.* at 36. The Supreme Court, relying upon *McPherson*, confirmed as recently as 2000 "that the state legislature's power to select the manner for appointing electors is plenary." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

Exercising its plenary power, the South Carolina General Assembly has decided that the State's presidential electors should be selected on a statewide winner-take-all basis. *See* S.C. Code Ann. § 7-19-70. The winner-take-all approach was among the first methods used after ratification of the Constitution. In fact, Pennsylvania appointed its electors via a winner-take-all system in the presidential election of George Washington in 1789. *McPherson*, 146 U.S. at 29. Other states soon followed suit, including Virginia in 1800, on the advice of Thomas Jefferson. *Id.* at 31–32. Currently, forty-eight states and the District of Columbia employ a winner-take-all approach. (J.A. 13). Only two states, Maine and Nebraska, use a different allocation method under which two electors are awarded to the candidate who earns a plurality of the statewide vote and the remaining electors are selected by congressional district. *Schweikert*, 2016 WL 7046845, at *2 n.1.

In sum, an overwhelming supermajority of state legislatures have exercised their plenary discretion to adopt the statewide winner-take-all approach to selecting presidential electors, which has been part of our Nation's electoral framework for over two centuries. By failing to account for this rich history, Plaintiffs' claims immediately conflict with an important principle that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). Indeed, as the Supreme Court has recognized,

"the longstanding 'practice of government' can inform our determination of 'what the law is.'" *Id.* at 525 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819); *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

Courts should therefore "put significant weight upon historical practice" in interpreting the Constitution. *Id.* at 524 (emphasis omitted); *see also Rucho*, 139 S. Ct. at 2496 (noting, in an analogous context, that "the history is not irrelevant," where "[t]he Framers were aware of electoral districting problems and . . . . settled on a characteristic approach, assigning the issue to the state legislatures"); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (rejecting a one-person, one-vote challenge to a redistricting plan and stating "[w]hat constitutional history and our prior decisions strongly suggest, settled practice confirms," as adopting the plaintiffs' preferred method of "apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries"); *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1813 (2014) (asserting that "any test must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change").

Against this historical backdrop, it comes as little surprise that federal courts across the country have consistently rejected various challenges to the States' plenary authority to allocate electors as they deem fit under the Elector Clause. *See,*

e.g., *League of United Latin Am. Citizens v. Abbott* (*LULAC*), 369 F. Supp. 3d 768 (W.D. Tex. 2019) (rejecting plaintiffs' one-person, one-vote claim, First Amendment claim, and Voting Rights Act claim and dismissing the complaint with prejudice), *appeal filed*, No. 19-50214 (5th Cir. Mar. 13, 2019); *Lyman v. Baker*, 352 F. Supp. 3d 81 (D. Mass. 2018) (rejecting plaintiffs' one-person, one vote and First Amendment claims and dismissing the complaint with prejudice), *appeal filed*, No. 18-2235 (1st Cir. Dec. 28, 2018); *Rodriguez v. Brown*, No. 2:18-cv-001422-CBM-ASx, 2018 WL 6136140, at *1 (C.D. Cal. Sept. 21, 2018) (same), *appeal filed*, No. 18-56281 (9th Cir. Sept. 28, 2018); *see also Conant v. Brown*, 248 F. Supp. 3d 1014, 1025 (D. Or. 2017) (collecting cases). And Plaintiffs in the case *sub judice* have offered no plausible reason for the Court to stray from this settled path and upend two centuries of electoral practice, particularly on the eve of a presidential election.

The Supreme Court has recognized that the historical context of this specific electoral practice has independent legal significance. In *McPherson*, the Court described the question presented as "not one of policy, but of power" and emphasized that, by 1892, the constitutional construction giving the States plenary discretion over the manner of appointing presidential electors had "prevailed too long and been too uniform to justify . . . interpreting the language of the constitution as conveying any other meaning." 146 U.S. at 35–36. As the Court cogently noted,

the Constitution "recognizes that the people act through their representatives in the legislature, and leaves it to the legislatures exclusively to define the method of effecting the object." *Id.* at 27. And "where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made" for purposes of the Fourteenth and Fifteenth Amendments. *Id.* at 40. Relying upon these principles, the *McPherson* Court dismissed a "non-representational" argument of the type now raised by Plaintiffs, finding "no reason for holding that the power confided to the states by the constitution has ceased to exist because the operation of the system has not fully realized the hopes of those by whom it was created." *Id.* at 36. By rejecting the plaintiffs' challenge, the Court underscored the Elector Clause's textual commitment of exclusive authority to the States and dispensed with a theory that would have "wrenched" the Constitution "from the subjects expressly embraced within it, and amended [it] by judicial decision." *Id.*

Fifty years ago, a three-judge district court heard a decidedly similar challenge to the constitutionality of Virginia's winner-take-all system. *See Williams*, 288 F. Supp. at 622, *aff'd*, 393 U.S. 320, *reh'g denied*, 393 U.S. 1112. The plaintiffs in *Williams* argued that Virginia's "winner-take-all," or general ticket, approach to appointing presidential electors violated the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 624, 626. After

confronting the plaintiffs' policy arguments, the three-judge court concluded as follows:

> [I]t is difficult to equate the deprivations imposed by the unit [winner-take-all] rule with the denial of privileges outlawed by the one-person, one vote doctrine or banned by Constitutional mandates of protection. In the selection of Electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone.

Id. at 627. Recognizing that the winner-take-all method is merely an example of the "unit rule," the three-judge court asserted that "nothing in the unit rule [is] offensive to the Constitution." *Id.* at 627. The court therefore held that "Virginia's design for selecting presidential electors does not disserve the Constitution," *id.* at 629, and the Supreme Court summarily affirmed, 393 U.S. 320, *reh'g denied*, 393 U.S. 1112.

"Summary affirmances . . . without doubt reject the specific challenges presented," and they "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). When the Supreme Court summarily affirms, it "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Id.* But "[v]otes to

affirm summarily . . . , it hardly needs comment, are votes on the merits of a case." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (per curiam) (Brennan, J.)). Therefore, "lower courts are bound by summary decisions by [the Supreme] Court 'until such time as the Court informs [them] that [they] are not.'" *Id.* at 344–45 (alterations in original) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)).

As the district court correctly held below, *Williams* forecloses Plaintiffs' one-person, one-vote challenge. While Plaintiffs seek to distance themselves from *Williams* by arguing that the Virginia statute at issue provided for the election of individual electors named on the ballot, as opposed to the candidates for President and Vice President, that is a distinction without a difference.[4] The district court

4. Plaintiffs fail to properly acknowledge that the ballot at issue in *Williams* reflected a list of each party's presidential electors *and* the candidates for president and vice-president. (J.A. 138 ("The form of ballot uniformly used throughout Virginia for voting in presidential elections . . . . lists under the name of each political party and the nominees thereof for President and Vice President the names of that party's elector candidates, two designated as at-large and one listed and designated as from and resident in each of the respective 10 Congressional districts of Virginia. It permits a voter to vote only for one or another political party, and thus for the party's nominees for President and Vice President.")). Consequently, the cited distinction between the Virginia ballot in *Williams* and the approach presently utilized in South Carolina is insignificant and irrelevant. This Court is therefore bound by the summary disposition in *Williams* unless and until the Supreme Court declares otherwise. *See Hicks*, 422 U.S. at 345; *see also Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 922 n.12 (7th Cir. 2015) ("Although a summary disposition 'prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions,' it is not binding when the 'facts are *very different* from

properly found "it irrelevant that the Virginia statute allowed its citizens to vote for a particular elector rather than the candidate." (J.A. 604). After all, "the electors in Virginia were aligned with one of the two political parties, and the Commonwealth"—just like South Carolina—"ultimately gave 100% of its electoral college votes to the candidate of the party that had the most electors chosen." (J.A. 604). Because *Williams* is on all fours with this case, Plaintiffs' one-person, one-vote claim must fail.

In their brief, Plaintiffs dedicate a great deal of ink to the Supreme Court's decision in *Gray v. Sanders*, 372 U.S. 368 (1963). *See* Br. Appellants 23–30. Plaintiffs' argument, however, is self-defeating because *Gray* is inapposite. And the Court need not take Defendants' word for it—the Supreme Court expressly said so in the opinion. *See Gray*, 372 U.S. at 378 ("We think the analogies to the electoral college . . . are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality . . . .").

Plaintiffs' reliance upon *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), is similarly misplaced. In *Williams*, the three-judge district court expressly held that Virginia's "general ticket" system—

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the facts of [the present] case.'" (emphasis added) (quoting *Mandel*, 432 U.S. at 176–77)).

which is virtually indistinguishable from South Carolina's statewide winner-take-all system—did "not come within the brand of" *Gray*, *Wesberry*, or *Reynolds* because it was "but another form of the until rule," which is not "offensive to the Constitution." 288 F. Supp. at 626–27. And as noted above, the Supreme Court summarily affirmed that decision. *Williams*, 393 U.S. at 320, *reh'g denied*, 393 U.S. at 1112. Likewise, Plaintiffs overstate the importance of *White v. Regester*, 412 U.S. 755 (1973). In *White*, the Court struck down the Texas House of Representatives' reapportionment plan that created a multimember at-large voting district. The Court, however, carefully limited its holding to emphasize that "multimember districts are not per se unconstitutional." *Id.* at 765. *White* has nothing to do with the Electoral College and does not in any way diminish the efficacy of *Williams*. Indeed, *White* is also readily distinguishable because Plaintiffs here cannot argue, and have not argued, that South Carolina's winner-take-all system was adopted to cancel out the voting strength of a specific group.

Nor does the Supreme Court's decision in *Bush v. Gore* change the result. 531 U.S. 98 (2000). At the outset of its opinion, the Supreme Court acknowledged "the state legislature's power to select the manner for appointing electors is plenary." *Id.* at 104. Further, the Court clarified that its "consideration [was] limited to the present circumstances, for the problem of equal protection in elections processes generally presents many complexities." *Id.* at 109; *see also id.* at 105 (framing the issue as

"whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate"). Thus, it seems a bit curious that Plaintiffs would argue the Court's case-specific decision in *Bush* somehow represented "a sea change" in over two centuries of case law. Br. Appellants 3. It did not. Just as Plaintiffs cannot resurrect and relitigate the facts of *Bush*, neither can they recast the resulting opinion and deploy it as a sword in a different partisan dispute.

Contrary to Plaintiffs' suggestion, *Bush* did not change the legal landscape or represent a doctrinal shift in this arena. The *Bush* Court did not once mention *Williams* or address any of the issues decided by the *Williams* Court in its opinion. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (stating the Supreme Court "does not normally overturn, or . . . dramatically limit, earlier authority sub silentio"). As to the argument over the invidiousness requirement, Plaintiffs read too much into the *Bush* Court's statement that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05. The Supreme Court has required proof of invidious discrimination in cases decided both before and after *Bush*. *See, e.g.*, *Dusch v. Davis*, 387 U.S. 112, 116 (1967) (observing "the constitutional test under the Equal Protection Clause is whether there is an 'invidious' discrimination."); *Harris v. Ariz. Indep. Redistricting Comm'n*, 136

S. Ct. 1301, 1307 (2016) (holding that "minor deviations from mathematical equality do not, by themselves, 'make out a prima facie case of invidious discrimination under the Fourteenth Amendment'" (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973))).

Plaintiffs' argument ignores that the Supreme Court, over time, has recognized two types of one-person, one-vote claims—one based upon invidious discrimination and the other based upon arbitrary and disparate treatment of voters. In *Roman v. Sincock*, for example, the Supreme Court drew the distinction, holding that the Equal Protection Clause requires "faithful adherence to a plan of population-based representation," meaning minor deviations are only allowed when "free from any taint of arbitrariness *or* discrimination." 377 U.S. 695, 710 (1964) (emphasis added). As two federal courts have recognized, the "disjunctive language" in *Roman* is consistent with *Bush* and other equal protection jurisprudence. *LULAC*, 369 F. Supp. 3d at 780; *Lyman*, 352 F. Supp. 3d at 88. Accordingly, the Supreme Court's holding in *Bush* did not work a doctrinal shift in equal protection case law that would justify calling into question the continued validity of *Williams*. The *Williams* case, though not convenient for Plaintiffs' position, is still good law and controls here, as the district court correctly concluded.

"Considering existing case law," the district court—like the many other courts to consider this issue—had no need to "delve too deeply into the content of [the]

complaint because it d[id] not create a 'plausible claim for relief.'" *Schweikert*, 2016 WL 7046845, at *2 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Plaintiffs' one-person, one-vote claim is neither novel nor plausible, and the Court should affirm the district court's order dismissing it with prejudice.

B. Plaintiffs failed to state a plausible one-person, one-vote claim because South Carolina's method for appointing electors equally weighs all votes.

Even if Plaintiffs' one-person, one-vote claim was not foreclosed by history and binding precedent, it still fails as a matter of law. In 1892, the Supreme Court observed that "from the formation of the government until now the practical construction of [Article II, Section 1, Clause 2] has conceded plenary power to the state legislatures in the matter of the appointment of electors." *McPherson*, 146 U.S. at 35. According to the Supreme Court, legislatures could order appointment by the people at-large or in districts, by the legislature itself, by the governor, or by the state supreme court, because "[t]he appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states." *Id.* at 34–35. But "[t]he Founders certainly did not think proportional representation was required," and the Court has "clearly foreclose[d] any claim that the Constitution requires proportional representation." *Rucho*, 139 S. Ct. at 2499 (quoting *Davis*, 478 U.S. at 130); *see also Mobile v. Bolden*, 446 U.S. 55, 75–76 (1980) (plurality opinion) ("The Equal

Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").

Under the one-person, one-vote principle articulated in *Gray*, "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their income, and wherever their home may be in that geographical unit." 372 U.S. at 379. South Carolina's winner-take-all approach for appointing presidential electors gives "all who participate . . . an equal vote" and does not qualify that right based upon any impermissible classification. *Id.*

Plaintiffs had the right to vote—and did vote—in the elections about which they now complain, and nothing about the winner-take-all system frustrated or infringed upon their exercise of that right. Their lack of success at the ballot box does not give rise to a cognizable constitutional harm. After all, the winner-take-all system did not treat Plaintiffs any differently because their votes were counted just the same as every other voter in South Carolina. *See McPherson*, 146 U.S. at 40 ("If presidential electors are appointed by the legislatures, no discrimination is made; if they are elected in districts where each citizen has an equal right to vote, the same as any other citizen has, no discrimination is made."). In short, the winner-take-all "system complies with equal protection because it does not inherently favor or disfavor any particular group of voters." *Lyman*, 352 F. Supp. 3d at 89.

Plaintiffs nevertheless seek to complicate this case by splitting the winner-take-all system into two stages. According to Plaintiffs, the first stage consists of voters casting ballots for presidential candidates, and in the second stage, votes are tabulated and all of South Carolina's electors are awarded to the winner. Because the loser receives zero electoral votes under the winner-take-all approach, Plaintiffs contend that the system "discards" their votes solely based upon their political affiliation. Br. Appellants 2. However, Plaintiffs cannot stretch the one-person, one-vote principle so far as to require "that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support." *Rucho*, 139 S. Ct. at 2501. As the Supreme Court recently noted in *Rucho*, "[t]he Framers would have been amazed at a constitutional theory that guarantees a certain degree of representation to political parties," *id.* at 2501 n.1; yet, Plaintiffs' creativity is no substitute for plausibility.

Still undeterred in their quest for partisan proportionality, Plaintiffs insist that their two-stage theory removes them from the binding nature of *Williams*—and, instead, brings them under the umbrella of *Gray*—because the Supreme Court has not considered their argument about the second stage. As noted above, though, *Gray* is inapposite, and the Supreme Court said so itself. *Gray*, 372 U.S. at 378 ("We think the analogies to the electoral college . . . are inapposite." (footnote omitted)). A closer look at *Gray* confirms that Georgia's impermissible county unit system,

which created significant geographic discrimination, bears no resemblance to the Electoral College system.

It is also worth noting that *Gray* was decided six years before *Williams*. If the Supreme Court wished to walk back its language and apply the principles of *Gray* to the Electoral College system, notwithstanding its statements to the contrary, the Court would have done so. Instead, the Court summarily affirmed. *Williams*, 393 U.S. at 320, *reh'g denied*, 393 U.S. at 1112.

In any event, no votes are discarded based upon invidious discrimination under the winner-take-all system. States have used the winner-take-all system since the first presidential election, and it is the predominant approach used today. Given that Plaintiffs and their counterparts in the companion cases contend that the system affects Republican voters in California the same way it affects Democratic voters in South Carolina, it is difficult to identify or assign an invidious motive to its adoption. To the contrary, South Carolina adopted winner-take-all, just like forty-seven other states and the District of Columbia, to protect against the use of winner-take-all by other States. The fact that the vast majority of States using the winner-take-all method do not have a history of electoral discrimination only further undercuts Plaintiffs' argument.

South Carolina's use of the winner-take-all approach is neither discriminatory nor arbitrary. The State has merely followed the strictures of the Constitution by

selecting a system under Article II, Section 1, Clause 2 to appoint electors who then cast its nine votes pursuant to the Twelfth Amendment. And the Supreme Court has expressly blessed this approach in the primary case upon which Plaintiffs rely. *See Gray*, 372 U.S. at 378 ("The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election." (footnote omitted)); *id.* at 380 ("The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President."). Accordingly, even if the Court deems it necessary to reach the merits, Plaintiffs have failed to state a plausible claim for relief under the one-person, one-vote rule. Therefore, the Court should affirm the district court's order dismissing Plaintiffs' equal protection claim with prejudice.

III. The Winner-Take-All Method Does Not Unreasonably Burden Plaintiffs' First and Fourteenth Amendment Rights to Freedom of Association.

Just as the winner-take-all approach does not infringe upon Plaintiffs' equal opportunity to participate in elections, neither does South Carolina's use of the predominant method of selecting presidential electors unconstitutionally burden Plaintiffs' rights to freedom of association under the First and Fourteenth

Amendments.[5] "The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). While "the Equal Protection Clause of the Fourteenth Amendment ensures equal weighting of votes, or . . . equal effectiveness of votes," "[t]he First Amendment . . . protects the right to cast an effective vote by prohibiting restrictions on ballot access that impair the ability of citizens to express their political preferences, or that limit the opportunity for citizens to unite in support of the candidate of their choice." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 959–60 (4th Cir. 1992).

But "[t]he First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v.*

5. While Plaintiffs argue "*Williams* does not control" their First Amendment claim, Br. Appellants 42 n.9, Governor McMaster and Secretary Hammond would note the *Williams* court concluded that "Virginia's design for selecting presidential electors does not disserve the Constitution." 288 F. Supp. at 629. Arguably, the court's pronouncement is broad enough to encompass other claims of constitutional infirmity given the thorough discussion of the history and interpretation of the Elector Clause. But even if *Williams* does not foreclose Plaintiffs' First Amendment claim, it still fails as a matter of law.

Ark. State Hwy. Emps., Local 1315, 441 U.S. 463, 464–65 (1979). After all, "the function of the election process is 'to winnow out and finally reject all but the chosen candidates.'" *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 735 (1974)). "Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Id.* To that end, "not all restrictions imposed by the States" amount to "constitutionally-suspect burdens on voters' rights to associate or choose among candidates." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Plaintiffs' First Amendment claim here tracks the theory Justice Kagan espoused in her concurrence in *Gill v. Whitford* and reiterated in her dissent in *Rucho v. Common Cause*. According to Justice Kagan, plaintiffs who are members of the losing party in the State and "deprived of their natural political strength" may assert a claim for associational harm because their party "may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). "By diluting the votes of certain citizens," Justice Kagan argues, "the State frustrates their efforts to translate those affiliations into political effectiveness." *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting). Justice Kagan's theory traces its roots to Justice Kennedy's concurrence in *Vieth v. Jubelirer*, in which he argued that, by "subjecting a group of

voters or their party to disfavored treatment by reason of their views," First Amendment concerns arise when the State impermissibly burdens "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). Respectfully, a majority of her colleagues did not agree, and Justice Kagan's theory is not the law of the land.

As the district court cogently noted, Plaintiffs' "argument conflates a diminishing *motivation* to participate with a severe burden on the actual *ability* of people to participate in the voting process." (J.A. 608). And Plaintiffs' reliance upon inapposite First Amendment cases is illustrative. The instant case, for example, has nothing to do with ballot access. *Cf. William v. Rhodes*, 393 U.S. 23, 33 (1968) (holding "Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, *operate to prevent such a group from ever getting on the ballot* and the Ohio system thus denies the 'disaffected' not only a choice of leadership but a choice on the issues as well" (emphasis added)). Plaintiffs have not alleged, nor could they, that their preferred Democratic presidential candidates have not appeared on the ballot. Their reliance upon *Reynolds v. Sims* is similarly misplaced because that case was decided on equal protection—not First Amendment—grounds. 377 U.S. 533, 568 (1964) (holding

"the Equal Protection Clause requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis").

Simply put, losing an election does not give rise to an unconstitutional infringement upon the associational rights of the losing candidate's supporters. South Carolina's chosen method of allocating electors gives Plaintiffs—just like every other voter in the State—the opportunity to express their partisan preferences by voting in the election. The winner-take-all method neither restricts Plaintiffs' access to the ballot nor burdens their ability to unite in support of their candidate of choice. Although Plaintiffs may be disappointed with the outcomes of the past several elections, the First Amendment guarantees only "the right to participate in the political process," not "political success." *Martin*, 980 F.2d at 960. Plaintiffs' alleged harms do not result by reason of their views. Instead, Plaintiffs' perceived disadvantage is merely a consequence of South Carolina having more Republican voters than Democratic voters. Thus, while losing elections may be deflating for Democratic supporters, that is simply "an inescapable reality of democracy." *LULAC*, 369 F. Supp. 3d at 783.

The district court correctly held that Plaintiffs failed to demonstrate South Carolina's winner-take-all system works an unconstitutional burden upon their associational rights, rendering it unnecessary to proceed to the legitimate state interest prong of the analysis. But even if Plaintiffs had overcome the first hurdle,

they would have stumbled on the final one. Like every other state in the Union, South Carolina has an interest in maximizing its influence in the Electoral College when selecting the President by having electors vote in a unified bloc. And Thomas Jefferson recognized the merit of this approach in "advis[ing] Virginia to switch to the general ticket"—or winner-take-all—method of appointment. *Williams*, 288 F. Supp. at 626. As the *Williams* court observed, Jefferson's "advice sprang from a desire to protect his State against the use of general ticket by other States." *Id.* Jefferson "found that when chosen by districts, Virginia's representation among the electors was divided, while other States made their votes mean more in the college by adoption of the general ticket scheme of selection." *Id.*

This "is no less true today" than when Jefferson said it 1800 and the *Williams* court recognized it again in 1968. *Id.* It is beyond dispute that a fractured slate of electors would diminish South Carolina's influence in the Electoral College and stymie the State's ability to elect the candidate for President of the United States chosen by a majority of its citizens. Given that "47 other states and the District of Columbia also utilize WTA systems, the impetus—as recognized by Jefferson—for [South Carolina's] policy under this interest is well-established." *LULAC*, F. Supp. 3d at 783. "Moreover, that nearly all States have implemented this policy, and have done so since 1832, only further underscores the non-pretextual nature of" South Carolina's interest in implementing its winner-take-all system. *Id.* at 783–84 (citing

McPherson, 146 U.S. at 32). Accordingly, the Court should affirm the district court's holding that Plaintiffs failed to state a plausible claim for relief under the First and Fourteenth Amendments.

IV. Plaintiffs' Voting Rights Act Claim Fails as a Matter of Law.

Finally, the Court should affirm the district court's holding that Plaintiffs failed to state a plausible claim for relief under Section 2 of the Voting Rights Act of 1965. Section 2 prohibits any "standard, practice, or procedure . . . imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

> A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to *participation* by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b) (emphasis added). Nevertheless, Congress has clarified that nothing in Section 2 "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

In *Thornburg v. Gingles*, the Supreme Court established the seminal three-prong test for demonstrating a Section 2 violation: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to

constitute a majority in the single-member district," (2) "the minority group must be able to show that it is politically cohesive," and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. 30, 50–51 (1986).

"But simply clearing the *Gingles* hurdles, while necessary to prove a possible violation of § 2, is not sufficient to establish an actual violation." *United States v. Charleston Cty.*, 365 F.3d 341, 348 (4th Cir. 2004). Plaintiffs "asserting vote dilution must [also] show 'that, under the totality of the circumstances, the State's [challenged electoral scheme] has the effect of diminishing or abridging the voting strength of the protected class.'" *Id.* (second alteration in original) (quoting *Voinovich v. Quilter*, 507 U.S. 146, 157 (1993)). "Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

The Supreme Court has recognized it is "clear from the text of the statute . . . that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Moreover, and perhaps more importantly, the Supreme Court has rejected Section 2 claims of racial vote dilution

when they are "a mere euphemism for political defeat at the polls." *Whitcomb*, 403 U.S. at 153; *see also League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 853–54 (5th Cir. 1993) (en banc) ("As Justice Marshall suggested, failures of a minority group to elect representatives of its choice that are attributable to 'partisan politics' provide no grounds for relief. Section 2 is 'a balm for racial minorities, not political ones—even though the two often coincide. The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.' Rather, § 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats." (quoting *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992))).

As the district court aptly noted, Plaintiffs' Section 2 "claim operates on the same premise as their [one-person, one-vote] claim—that courts should be able to consider the constitutionality of a state's [winner-take-all] electoral college system using the same legal tools and concepts of constitutional fairness that the courts have relied on in assessing state-level voting procedures." (J.A. 609). To be sure, Plaintiffs are trying to fit a square peg in a round hole, attempting to manufacture a Voting Rights Act claim in this case and in the parallel proceedings in Texas but not in the actions filed in Massachusetts and California. *Compare LULAC*, 369 F. Supp. 3d 768 (W.D. Tex. 2019), *with Lyman*, 352 F. Supp. 3d 81 (D. Mass. 2018), *and*

Rodriguez, 2018 WL 6136140 (C.D. Cal. Sept. 21, 2018). However, Plaintiffs' arguments in this regard are quickly undercut by their own complaint.

The district court correctly disposed of Plaintiffs' Section 2 claim in short order because South Carolina's use of the winner-take-all method "does not mean that the political process is 'not equally open to *participation* by' Democratic voters, whether they be African-American or of another race." (J.A. 609 (quoting 52 U.S.C. § 10301(b))). In fact, "many white South Carolinians voted for Democratic candidates in the past, demonstrating that the white majority has not voted 'sufficiently as a bloc . . . to defeat the minority's preferred candidate.'" (J.A. 609–10 (quoting *Thornburg*, 478 U.S. at 34)). Maximizing political power to protect the State from other States' use of the winner-take-all approach does not translate into a racially discriminatory voting practice. Plaintiffs are trying to (1) conflate political affiliation with racial identification and (2) equate dissatisfied voters with disenfranchised citizens. But these are not the claims Section 2 was designed to remedy.

The crux of Plaintiffs' theory is that "because the Individual Plaintiffs have voted for, and will vote for, the [D]emocratic candidate for President in South Carolina, they have been, and will be again, deprived of the right to have their votes counted equally and meaningfully toward the election of the President." (J.A. 18; *see also* J.A. 19–20 (alleging that only three of the six named Plaintiffs are African-

Americans)). In other words, Plaintiffs' complaint is premised not on racial discrimination but on their oft-repeated claim that they have suffered as a result of their stated preference for voting for Democratic candidates. Undoubtedly, "had the Democrats won all the elections or even most of them"—as they did under an identical winner-take-all mechanism in majority Democratic states—Plaintiffs "would have had no justifiable complaints about representation." *Whitcomb*, 403 U.S. at 153. As the Fifth Circuit noted, however, the Supreme Court has "established a clean divide between actionable vote dilution and 'political defeat at the polls.'" *Clements*, 999 F.2d at 850 (quoting *Whitcomb*, 403 U.S. at 153).

Even if Plaintiffs were able to overcome the *Gingles* hurdles, they failed as a matter of law to offer an acceptable "undiluted" voting practice against which the district court could judge the winner-take-all system used in forty-eight states and the District of Columbia.[6] *See Reno*, 520 U.S. at 480. Although their primary proposed remedy is to allow the South Carolina General Assembly the opportunity to pass legislation creating a new system for allocating presidential electors, (J.A.

6. Indeed, Plaintiffs do not even find acceptable the only other method currently in use by Maine and Nebraska. (J.A. 44). While they try to play coy on the remedy issue, the Court need not peek too far behind the curtain to confirm that Plaintiffs are demanding proportional representation. (J.A. 44). But neither the Constitution nor the Voting Rights Act provides for any such right, and federal courts are without authority to order that remedy.

18), that is too vague for the Court to seriously consider. Further, as a practical matter, the General Assembly is not even a party to this action.

As an "alternative remedy," Plaintiffs propose "a proportional method of distributing Electors, selecting a proportional number of Electors to each party, based on the number of votes each party's candidate receives statewide." (J.A. 44). This, of course, is Plaintiffs' ultimate aim. But Plaintiffs' demand for proportional representation flies in the face of, and conflicts with, Section 2, which specifically disclaims any "right to have members of a protected class elected in numbers equal to their proportion in population." 52 U.S.C. § 10301(b). Without a proposed undiluted remedy to use as a benchmark, Plaintiffs' Section 2 claim must fail.

"As our system has it, one candidate wins, the others lose." *Whitcomb*, 403 U.S. at 153. Plaintiffs' unrealized partisan goals were shared equally among all members of their political party in South Carolina, as well as by members of the opposing political party in other States. "Absent evidence that minorities have been excluded from the political process, a lack of success at the polls is not sufficient to trigger judicial intervention." *Clements*, 999 F.2d at 853. Because Plaintiffs failed to state a plausible claim for racial voting dilution and did not propose an acceptable "undiluted" remedy, the Court should affirm the district court's order dismissing, with prejudice, Plaintiffs' claim under Section 2 of the Voting Rights Act.

CONCLUSION

For the foregoing reasons, the Court should dispose of this appeal without reaching the merits, vacate the district court's order, and remand with instructions to dismiss Plaintiffs' complaint for want of subject-matter jurisdiction. In the alternative, the Court should affirm the district court's judgment on the merits because Plaintiffs failed to state any plausible claims for relief.

Respectfully submitted,

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December 18, 2019
Columbia, South Carolina

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 19-1297 **Caption:** Eugene Baten, et al. v. Henry McMaster, et al.

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